TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, [redacted] 1926

No. [redacted] 272

THE STATE OF OHIO EX REL. JAMES CLARKE, PLAINTIFF IN ERROR,

vs.

ALFRED F. DECKEBACH, AS AUDITOR OF THE CITY OF CINCINNATI

IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO

FILED JANUARY 20, 1926

(31,625)

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 902

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IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 26, 1926

[fol. 1] Return to writ of error omitted in printing.

[fol. 2] **IN SUPREME COURT OF OHIO**

No. 19154

THE STATE OF OHIO ex Rel. JAMES CLARKE, Relator,

vs.

ALFRED F. DECKEBACH, as Auditor of the City of Cincinnati, Respondent

PETITION FOR WRIT OF ERROR—Filed January 7, 1926

To the Hon. C. T. Marshall, Chief Justice of the Supreme Court of the State of Ohio:

Now comes James Clarke, a subject of the King of England, and alleges that as Relator he brought an original action in mandamus in the Supreme Court of Ohio, against the Auditor of the City of Cincinnati, seeking to compel said auditor to accept from relator the prescribed fee and issue to relator a license to operate billard tables in said city.

That in said original cause on October 13th, 1925 a final judgment was rendered against your petitioner by the Supreme Court of Ohio, that being the highest court of law or equity in the State of Ohio, wherein it was adjudged that the motion of relator for judgment on the pleadings be overruled and that the writ of mandamus prayed for be denied. The Supreme Court of Ohio holding that the enactment of the ordinance of the City of Cincinnati providing that no license to operate a billard table shall be granted to a person who is not a citizen of the United States was within the power of said city. That the ordinance was a valid one and that it was not in conflict with the equal protection clause of the Fourteenth Amendment of the United States Constitution, and that said ordinance did not violate any provision of any treaty of Great Britain with the United States.

In each and all of which rulings and judgments said Supreme Court of Ohio erred to the prejudice of plaintiff in error.

All of which appears in the record, opinion and final judgment of said Supreme Court of the State of Ohio.

Wherefore your petitioner prays for an allowance of a writ of error from the Supreme Court of the United States to the Supreme Court of the State of Ohio and the judges thereof, to the end that the record in this case may be removed into the Supreme Court of the United States, and the errors complained of by your petitioner may be examined and corrected and said judgment reversed; and your petitioner will ever pray.

George S. Hawke, Attorney for James Clarke.

The writ of error as prayed for in the foregoing petition is hereby allowed this 7 day of January, 1926, and said petitioner is ordered to give bond to cover the costs in this action in the amount of Two hundred dollars.

Dated at the City of Columbus, Ohio, this 7th day of January, 1926.

Carrington T. Marshall, Chief Justice Supreme Court of the State of Ohio.

[fol. 2a] [File endorsement omitted.]

[fol. 3] IN SUPREME COURT OF OHIO

[Title omitted]

ASSIGNMENTS OF ERROR—Filed January 7, 1926

Now comes the relator in connection with the petition for a writ of error herein and respectfully submits that in the record, proceedings, decision and final judgment of the Supreme Court of the State of Ohio, in the above entitled action, there is manifest error in this, to-wit:

First. The judgment of the Supreme Court of Ohio in this cause is repugnant to and in conflict with Section 1 of the Fourteenth Amendment to the Constitution of the United

States, which declares that no person shall be denied the equal protection of the law, by any state.

Second. The Supreme Court of Ohio erred in holding that the Ordinance of the City of Cincinnati which provides for the Licensing of Billiard and Pool Tables, but denies a license to any person who is not a citizen of the United States, was a valid ordinance.

Third. The Supreme Court of Ohio erred in holding that the ordinance of the City of Cincinnati which limited the issuance of billiard table licenses to citizens of the United States only, did not violate the provisions of the treaties of Great Britain with the United States specifically or generally under the "national treatment" or "most favored nation" clauses, the relator invoking their protection as a subject of the King of England.

Fourth. The Supreme Court of Ohio erred in overruling relator's motion for a judgment in his favor on the pleadings and in denying him the writ of mandamus for which he prayed.

Wherefore the petitioner prays that the errors complained of may be examined and corrected and the said judgment of the Supreme Court of Ohio reversed and said cause remanded as provided by law; and that the petitioner may have such other and further relief in the premises as may be just; and your petitioner will ever pray.

George S. Hawke, Attorney for Petitioner.

[fol. 3a] [File endorsement omitted.]

[fol. 4] IN SUPREME COURT OF OHIO

[Title omitted]

ORDER ALLOWING WRIT OF ERROR—Filed Jan. 7, 1926

The above entitled cause coming on to be heard upon the petition of the relator therein for a writ of error from the Supreme Court of the United States to the Supreme Court of the State of Ohio, and upon examination of said petition

and the record in said case, and desiring to give the petitioner an opportunity to present to the Supreme Court of the United States the questions presented by the record in said case,

It is ordered that a writ of error be and the same hereby is allowed to this court from the Supreme Court of the United States and that the bond presented by said petitioner be, and the same is, hereby approved.

Columbus, Ohio, January 7, 1926.

C. T. Marshall, Chief Justice of the Supreme Court of the State of Ohio.

[fol. 4a] [File endorsement omitted.]

[fol. 5] In Supreme Court of Ohio

[Title omitted]

Writ of Error—Filed January 7, 1926

The United States of America, ss:

The President of the United States of America to the Honorable Judges of the Supreme Court of Ohio, Greeting:

Because in the record and proceedings, as also in the rendition of judgment, of a plea which is in the said Supreme Court of the State of Ohio, before you or some of you, being the highest court of law or equity of said State in which decision could be had in the said suit between State of Ohio, ex rel. James Clarke, as Relator, and Alfred F. Deckebach, as Auditor of the City of Cincinnati, as Respondent, wherein was drawn in question the validity of an ordinance of said city in said State of Ohio, and an authority exercised under said ordinance of said city in said state on the ground of its being repugnant to the provisions of the Constitution of the United States and the amendments thereto, and said decision was in favor of such, its validity, a manifest error hath happened, to the great damage of the said State of Ohio, ex rel. James Clarke, Relator, as by his complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do com-

mand you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 6th day of February, 1926, in the said Supreme Court of the United States, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable William H. Taft, Chief Justice of the Supreme Court of the United States, the 7th day of January, in the year of our Lord 1926.

Harry F. Rabe, Clerk of the United States District Court for the Southern District of Ohio, Eastern Division, by G. C. Cropper, Deputy.

Allowed: Carrington T. Marshall, Chief Justice of the Supreme Court of the State of Ohio.

[fol. 5a] [File endorsement omitted.]

[fols. 6 & 6a] Waiver of issuance and service of citation, filed January 12, 1926, omitted in printing.

[fol. 7] IN SUPREME COURT OF OHIO

[Title omitted]

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed January 7, 1926

To the Clerk of the Supreme Court of Ohio:

You are hereby directed to prepare a transcript of, certify and transmit to the Clerk of the Supreme Court of the United States the entire record in this cause, together with all pleadings and papers filed in this court.

George S. Hawke, Attorney for Relator.

[fol. 7a] [File endorsement omitted.]

[fols. 8 & 9] Bond on writ of error for $200.00, approved and filed January 16, 1926, omitted in printing.

[fol. 10] IN SUPREME COURT OF OHIO

[Title omitted]

PETITION FOR MANDAMUS AND PRAECIPE FOR SUMMONS—Filed May 19, 1925

The relator says that he is now and at all times hereinafter mentioned has been a subject of the King of England; that relator has resided in the City of Cincinnati, and in the County of Hamilton, and in the State of Ohio for some years past.

Relator says that he brings this action on his own behalf, and also on behalf of all other aliens of every nationality residing in the State of Ohio and elsewhere in the United States who are similarly situated.

That the respondent Alfred F. Deckebach is the duly elected, qualified and acting Auditor of the City of Cincinnati.

That it is the duty of the respondent, as said Auditor, to receive application for and to issue pool and billiard table license for the year 1925 for five tables at 1413 Central Avenue, Cincinnati.

That the respondent refused to receive such application, and a license was denied to relator for the sole and only [fol. 11] reason that the relator is an alien, being a subject of the King of England, and because of the provision of an Ordinance No. 76-1918 of the City of Cincinnati, to the effect that no license for a pool or billiard table shall be granted to a person who is not a citizen of the United States.

Relator says that on February 26th, 1918, the Council of the City of Cincinnati passed an ordinance, a copy of which is as follows:

An Ordinance, No. 76-1918, "Providing for the Licensing of Billiard and Pool Tables by Amending Original Section 777 of the Code of Ordinances of the City of Cincinnati."

Be it ordained by the Council of the City of Cincinnati, State of Ohio:

Section 1. That original Section 777 of the Code of Ordinances of the City of Cincinnati be and the same is hereby amended to read as follows:

Section 777. Billiard Table, etc.—Each proprietor of a billiard or pool table shall pay a license of twenty-five ($25.00) dollars per annum for one such table and fifteen ($15.00) dollars per annum for each additional table; provided however that no license shall be granted to a person who is not a citizen of the United States.

Section 2. That said original Section 777 of the Code of Ordinances be and the same is hereby repealed.

Section 3. This ordinance shall take effect and be in force from and after the earliest period allowed by law.

Passed February 26th, A. D. 1918.

Carl M. Jacobs, Jr., Vice-Mayor.

[fol. 12] Attest: Fred Schneller, Clerk.

Approved: John Galvin, Mayor.

February 28, 1918.

Relator says that he has a clear legal right to secure a license to operate pool and billiard tables in Cincinnati as well as has a citizen of the United States, and that neither he nor any other alien residing in the United States has any adequate remedy at law.

That said Ordinance of said City is in violation of and contrary to the treaties of commerce between the United States and Great Britain now in full force and effect; that the protection of the provisions of said treaties and especially the "national treatment" and "most favored nation" clauses thereof are hereby invoked by this relator, for himself and for all other aliens similarly situated.

Relator insists that by virtue of said treaties the respondent cannot lawfully refuse to grant relator a pool and billiard table license for said location in Cincinnati.

That said Ordinance No. 76-1918 is void and in contravention of Section One of the Fourteenth Amendment to

the Constitution of the United States, in that it denies to him and other aliens the equal protection of the law. The protection of the provisions of said Amendment is hereby especially invoked by this relator and by all other aliens of the class with relator on whose behalf this action is brought, and relator insists that by virtue thereof the respondent cannot lawfully deny to him or any other alien residing in the United States a pool or billiard table license in the City of Cincinnati.

That the relator always has been and now is willing and [fol. 13] ready to comply with any valid or constitutional ordinance of the City of Cincinnati respecting pool and billiard table licenses, and at all times has been and now is willing and ready to pay any valid license fee which the City of Cincinnati shall enact for the purpose, and at any time hereafter will so comply with said ordinance and make such payments.

Wherefore relator prays that he may secure the clear legal right to operate pool and billiard tables in Cincinnati upon payment of valid fees, and that all other aliens of the class with relator may also be granted relief; that the respondent as Auditor of the City of Cincinnati may be compelled to issue a pool and billiard table license to relator as set forth in this petition; that a writ of mandamus may be forthwith awarded commanding the respondent to accept the application of relator and the stipulated license fee, and issue a pool and billiard table license to relator; and for such other and further relief as the nature of the case may require.

George S. Hawke, Attorney for Relator.

Duly sworn to by James Clark. Jurat omitted in printing.

[fol. 14] PRÆCIPE

Issue summons to the Sheriff of Hamilton County, Ohio.
G. S. Hawke, Attorney for Relator.

[File endorsement omitted.]

[fol. 15] IN SUPREME COURT OF OHIO

[Title omitted]

ALTERNATIVE WRIT OF MANDAMUS AND SHERIFF'S RETURN—Filed May 22, 1925

STATE OF OHIO,
City of Columbus, ss:

To the Sheriff of Hamilton County, Ohio, Greeting:

You are hereby commanded to serve Alfred F. Deckebach, as Auditor of the City of Cincinnati, the respondent above named, with a copy of the following writ and make return of said writ and your action in the premises to this court on or before the 1st day of June, 1925:

To Alfred Deckebach, as Auditor of the City of Cincinnati:

Whereas, the following petition and the order of the allowance of an alternative writ of mandamus have been filed in and made by the Supreme Court of Ohio, copies of which are hereto attached to wit:

[fols. 16-20] Petition for mandamus and præcipe for summons omitted; printed side page 10 ante.

[fol. 21] [Title omitted]

Order Allowing Alternative Writ of Mandamus

This day came the relator, and made application for the allowance of a writ of mandamus herein; and, on consideration thereof, the court allow an alternative writ to issue against the respondent, Alfred F. Deckebach, as Auditor of the City of Cincinnati, returnable to this Court on the 13th day of June, 1925.

And it is ordered that the said Alfred F. Deckebach, immediately upon the service of this writ, accept the application of the said James Clarke for a pool and billiard table license and issue a license to him, or that at the time and place of the return of this writ said respondent shall show cause why he has not done so.

Enter:

C. T. Marshall, C. J.

[fol. 22] Now, therefore, in order that full and speedy justice should be done in the premises, we do command you that immediately upon receipt of this writ, you comply with the order of our Court as hereinbefore stated, or that you appear before the Supreme Court of Ohio, in the City of Columbus, on the 13th day of June, 1925, to show cause why you have not done so and have you then and there this writ.

Witness my hand and the seal of said court this 19th day of May, 1925.

Seba H. Miller, Clerk of the Supreme Court of Ohio.
(Seal.)

Cincinnati, Ohio, May 20, 1925.

Served the within named Alfred F. Deckebach, as Auditor of the City of Cincinnati, by delivering to him personally a true copy of this writ with all the endorsements thereon.

Richard B. Witt, Sheriff of Hamilton County, Ohio,
by Harry Tegeler, Deputy.

Sheriff Fees:

Service and return	.75
Mileage	.16
Total	.91

[File endorsement omitted.]

[fol. 23] IN SUPREME COURT OF OHIO

[Title omitted]

ANSWER—Filed June 10, 1925

Now comes the respondent and admits that he is the duly elected, qualified and acting auditor of the City of Cincinnati, and that as such Auditor it is his duty to receive applications for and to issue pool and billiard table licenses in the City of Cincinnati, which duty is enjoined upon him by virtue of the ordinances of said City.

Respondent further admits that on or about the 22nd day of April, 1925, the relator made application to him, as Auditor of the City of Cincinnati, for a pool and billiard table license for the year 1925, and that the respondent refused to receive such application and to issue such license.

Respondent further admits that on the 26th day of February, 1918, the Council of the City of Cincinnati passed Ordinance No. 76-1918, a copy of which is set forth in the petition of the relator.

The respondent states that he has no personal knowledge that the relator was at the time said application was made a subject of the King of England, and for lack of knowledge, therefore, denies that the relator is a subject [fol. 24] of such King, although respondent admits that he refused to receive said application and issue such license, by reason of the statement of the relator to this respondent that he was a subject of the King of England.

Respondent denies each and every other allegation in the petition of the relator contained.

Further answering respondent says that pool and bill-ard rooms and halls in the City of Cincinnati are and have been meeting places of idle and vicious people; that they have and are means of contributing to juvenile delinquincy; that numerous crimes and defenses against the laws of the State of Ohio and the ordinances of the City of Cincinnati have been committed therein; that such places are frequented by law-breakers and an undesirable class of persons; and that by reason thereof pool and billard rooms and halls are required to receive the most strict surveillance of the Police Department of the City of Cincinnati.

Respondent further says that as a class, persons who are not citizens of the United States are not as familiar with the laws and customs of the United States as are native born or naturalized citizens thereof, and that billard and pool rooms and halls maintained by persons who are not citizens of the United States are, therefore, a menace to society at large and the welfare of the public; that the ordinance complained of by the relator is a reasonable police regulation passed in the interests and for the benefit of the general public; and that said ordinance is a reasonable ordinance.

Wherefore respondent says that the petition of the re-
[fol. 25] lator should be dissmissed, and that upon a hearing of this cause the writ prayed for by the relator should be denied to him.

Frank K. Bowman, City Solicitor. L. L. Forchheimer, Assistant City Solicitor.

Duly sworn to by Alfred F. Deckebach. Jurat omitted in printing.

[File endorsement omitted.]

[fol. 26] IN SUPREME COURT OF OHIO

[Title omitted]

MOTION FOR JUDGMENT ON THE PLEADINGS—Filed June 18, 1925

Now comes the relator and moves the Court for a judgment in his favor on the pleadings herein.

George S. Hawke, Attorney for Relator.

Authority in Support of Motion.

State ex rel, Murphy Co. vs. Donahey, State Auditor, 98 Ohio State, 442.

State rel, Hawke vs. Le Blond, Judge, 108 Ohio State, 126.

[fol. 27] IN SUPREME COURT OF OHIO

[Title omitted]

DOCKET ENTRIES

1925.

May 19. Petition for alternative writ of mandamus filed.

" 19. Order allowing alternative writ of mandamus returnable June 13, 1925. C. T. Marshall, C. J. J. 30 P. 264.

" 19. Alternative writ of mandamus issued for defendant, to Sheriff of Hamilton County, Ohio, returnable June 1, 1925, Sent by registered mail. P. O. receipt No. 75215.

May 22. Summons returned and filed, endorsed: "Cincinnati, Ohio, May 20, 1925, Served the within named Alfred F. Deckebach, as Auditor of the City of Cincinnati, by delivering to him personally a true copy of this writ with all the endorsements thereon. Fees $0.91. Richard B. Witt, Sheriff of Hamilton County, Ohio, by Harry Tegeler, Deputy."

June 10. Answer of respondent (2 copies) filed.

" 13. Seven additional copies of Answer filed.

" 18. Motion by relator for judgment on the pleadings filed.

" 20. Proof of service filed.

[fol. 28]

Aug. 5. Brief of relator on motion for judgment on pleadings and proof of service filed.

Sep. 28. Printed briefs of respondent opposing motion for judgment on the pleadings and proof of service filed.

Oct. 13. Judgment for Respondent. J. 30 P. 353.

" 20. Certified copy of entry and cost bill sent to Attorney for relator.

1926.

Jan. 7. Petition for writ of error from U. S. Supreme Court of Ohio, allowed by Marshall, C. J. filed.

" 7. Order allowing writ of error filed.

" 7. Assignment of error filed.

" 7. Precipe as to transcript of record filed.

" 7. Writ of Error filed.

" 12. Waiver of issuance of service of citation and entry of appearance of respondent, filed.

[fol. 29] IN SUPREME COURT OF OHIO

[Title omitted]

JOURNAL ENTRY OF ORDER ALLOWING ALTERNATIVE WRIT OF MANDAMUS

1925.

May 19. "This day came the relator, and made application for the allowance of a writ of mandamus herein; and, on consideration thereof, the court allow an alternative writ to issue against the respondent, Alfred F. Deckebach, as Auditor of the City of Cincinnati, returnable to this Court on the 13th day of June, 1925. And it is ordered that the said Alfred F. Deckebach, immediately upon the service of the writ, accept the application of the said James Clarke for a pool and billiard table license and issue a license to him, or that at the time and place of the return of this writ said respondent shall show cause why he has not done so." Enter C. T. Marshall, C. J. Journal 30, Page 264.

JOURNAL ENTRY OF JUDGMENT

Oct. 13. "This cause came on to be heard upon the motion for judgment on the pleadings and was argued by counsel. On consideration whereof it is ordered and adjudged that said motion be sustained, for the reasons stated in the opinion filed in this case. It is therefore ordered and adjudged that the writ of mandamus prayed for be and the same hereby is denied and judgment is rendered in favor of respondent. It is further ordered and adjudged that the relator James Clarke pay the costs herein, taxed at $—, for which execution is awarded." Journal 30, Page 353.

[fol. 30] Certificate of lodgment omitted in printing.

[fol. 31] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 32] IN SUPREME COURT OF OHIO

[Title omitted]

OPINION

Municipal corporations—Ordinance regulating pool and billiard rooms—Aliens denied licenses—Constitutional law—Operation of pool room not "carrying on a trade"—Commercial treaty between United States and Great Britain not violated.

1. A municipal ordinance purporting to regulate and license pool and billiard rooms, which contains a provision that "no license shall be granted to a person who is not, by reason of such provision, a citizen of the United States," is not in conflict with any provision of the state or federal Constitution. (State ex rel. Balli v. Carrel, Aud., 99 Ohio St., 285, 124 N. E., 129, approved and followed.)

[1.] Licenses, 37 C. J., Sec. 56.

2. The operation of a pool and billiard room is not "carrying on a trade" within the meaning of the commercial treaty between the United States and Great Britain, and such ordinance does not therefore violate any of the provisions of that treaty.

[2.] Treaties, 38 Cyc., p. 978.

(No. 19154—Decided October 13, 1925)

In Mandamus

The relator is a subject of Great Britain, residing in the city of Cincinnati, Ohio, for several years last past. The city of Cincinnati has passed an ordinance licensing billiard and pool tables, which contains a provision that no license shall be granted to a person who is not a citizen of the United States. Relator made regular application for a license, and was refused on the ground of being an alien. He bring this

action in mandamus to compel the proper authorities to [fol. 33] issue such license, and alleges that the ordinance is a violation of commercial treaties between the United States and Great Britain and a denial of equal protection of the laws guaranteed by the Fourteenth Federal Amendment. The respondent has answered, admitting the application and refusal on the ground of relator being an alien, and further alleging:

"That pool and billiard rooms and halls in the city of Cincinnati are and have been meeting places of idle and vicious people; that they have been and are a means of contributing to juvenile delinquency; that numerous crimes and offenses against the laws of the state of Ohio and the ordinances of the city of Cincinnati have been committed therein; that such places are frequented by lawbreakers and an undesirable class of persons, and that, by reason thereof, pool and billiard rooms and halls are required to receive the most strict surveillance of the police department of the city of Cincinnati."

Respondent further says that as a class "persons who are not citizens of the United States are not as familiar with the laws and customs of the United States as are native born or naturalized citizens thereof, and that billiard and pool rooms and halls, maintained by persons who are not citizens of the United States, are therefore a menace to society at large and the welfare of the public."

No reply has been filed, and, upon the issues joined by the petition and answer, relator moves for judgment upon the pleadings.

Mr. George S. Hawke for relator.

Mr. Frank K. Bowman, city solicitor, and Mr. Landon [fol. 34] L. Forchheimer, assistant city solicitor, for respondent.

Marshall, C. J.:

This record puts in issue the validity of the city ordinance and challenges the power of the legislative branch of the city government to deny to aliens a license to operate pool and billiard tables. This ordinance was challeged in a

former proceeding in this court, entitled State ex rel. Balli v. Carrell, aud., 99 Ohio St., 285, 124 N. E., 129, in which this court held that it was not in conflict with any provision of the state or federal Constitution. In this proceeding it is sought to have the principle in that case overruled, and as grounds therefor it is urged that a recent case decided by the Supreme Court of the United States is in conflict therewith, being the case of Asakura v. City of Seattle, 265 U. S., 332, 44 S. Ct., 515, 68 L. Ed., 1041. Balli was a subject of Greece, and the license was denied to him because of his being an alien and a subject of Greece. The United States Supreme Court case, above referred to, involved a subject of Japan, and involved consideration of the treaty between the United States and Japan, proclaimed April 5, 1911 (37 U. S. Stat., 1504). That treaty contained a provision as follows:

"The citizens or subjects of each of the high contracting parties shall have liberty to enter, travel and reside in the territories of the other to carry on trade, wholesale and retail, to own or lease and occupy houses, manufactories, warehouses and shops, to employ agents of their choice, * * * and generally to do anything incident to or necessary for [fol. 35] trade upon the same terms as native citizens or subjects * * *." Article I.

Asakura was a pawnbroker, and the Supreme Court of the United States decided that the occupation of pawnbroker was carrying on "trade," and that to deny the right to conduct his business as pawnbroker would be a denial of his right to carry on trade.

It is claimed by counsel for the respondent that the case is materially different from the Asakura case, because of relator being a subject of Great Britain. A careful examination and comparison of the two treaties discloses that, while the language is greatly different in form, it is not materially different in substance. Both are commercial treaties, both are negotiated for the purpose of protecting merchants and traders who may occupy real estate for the purpose of carrying on trade and commerce. The treaty with Great Britain contains the following provision:

"The inhabitants of the two countries, respectively, shall have liberty freely and securely to come with their ships

and cargoes to all such places, ports, and rivers, in the territories aforesaid, to which other foreigners are permitted to come, to enter into the same, and to remain and reside in any parts of the said territories, respectively; also to hire and occupy houses and warehouses for the purposes of their commerce; and, generally, the merchants and traders of each nation, respectively, shall enjoy the most complete protection and security for their commerce, but subject always to the laws and statutes of the two countries, respectively." (8 Stat. U. S., 228, Article I.)

It is claimed that the last clause thereof materially [fol. 36] affects the situation. It would seem more reasonable to construe that clause as intending to refer only to such laws and statutes as do not unlawfully discriminate against aliens who are entitled to the general benefits of the treaty.

The treaty does protect merchants and traders, and if Clarke is a trader he is entitled to protection as such. The word "trade" has a well-settled meaning in commerce, which has been adopted by courts generally as the business of the purchase and sale or exchange of goods, wares, and merchandise. In re Hudson River Elec. Power Co. (D. C.), 173 F., 934, 947; Jackson v. Town of Union, 82 Conn., 266, 73 A., 773.

In the case of May v. Sloan, 101 U. S., 231, 25 L. Ed., 797, the Supreme Court of the United States has given a definition which must be accepted as conclusive in the instant case, inasmuch as a federal question is involved. At page 237 of the opinion we find the following:

"The word 'trade,' in its broadest signification, includes, not only the business of exchanging commodities by barter, but the business of buying and selling for money, or commerce and traffic generally."

Measured by this definition, the operator of a pool room is not a trader, and it must therefore be concluded that this ordinance does not violate the terms of treaties between the United States and Great Britain. It remains to be determined whether the ordinance is a valid piece of legislation, and whether it violates the guaranty of the equal protection of the laws.

This record raises no issue concerning the personal character of the relator. We are not called upon to determine [fol. 37] whether the relator has personal qualities which deny him the right to operate a pool table in the city of Cincinnati, but, on the contrary, we are only called upon to determine whether the class to which he belongs may properly be excluded from such occupation. The answer contains allegations about the character of pool rooms and of the lack of knowledge on the part of aliens concerning our laws and institutions. It is not our purpose to consider these allegations as reflecting upon the character of this relator, but we cannot ignore those allegations in determining the validity of the municipal legislation. Whether or not those allegations correctly state the character of pool rooms and the state of mind of subjects of foreign countries, the motion for judgment upon the pleadings assumes the truth of all those allegations. This legislation is enacted in the exercise of the police power, and its validity is therefore a political question, except that this court may consider as a justiciable question whether it is a reasonable exercise of such power. Under the well-settled rules which have heretofore been declared by this court, we may not declare that legislation invalid unless it has no reasonable relation to the public morals, public health, public order, and the peace and tranquility of the municipality. In view of the allegations of the answer, admitted as they are by the motion for judgment upon the pleadings, we are unable to find the legislation unreasonable. It has been decided in Schmidinger v. Chicago, 226 U. S., 578, 33 S. Ct., 182, 57 L. Ed., 364, Ann. Cas., 1914B, 284, that a municipality may regulate one trade and not another, and that this is not forbidden by the prohibition of [fol. 38] the Fourteenth Federal Amendment. That case is not strictly in point in deciding the instant case, because the city of Cincinnati in its regulation of the business of operating a pool room has withheld rights from aliens which are granted to citizens. The pertinent question therefore is whether, in any business other than trading, such discriminations are invalid as in violation of the Fourteenth Federal Amendment. It has been held by this court, in Bloomfield v. State, 86 Ohio St., 253, 99 N. E., 309, 41 L. R. A., (N. S.), 726, Ann. Cas., 1913D, 629, that a

license to traffic in intoxicating liquors might be withheld from aliens, though it would be granted to residents. In Heim v. McCall, 239 U. S., 175, 36 S. Ct., 78, 60 L. Ed., 206, Ann. Cas., 1917B, 287, it was held that the labor law of 1909 of New York state (Laws 1909, c. 36 [Consol. Laws, c. 31]), which discriminated against aliens in the matter of employment on the public works, was not unconstitutional.

Measured by these standards, and having in mind the admitted allegations of the answer, the conclusion must be reached that the discrimination in the instant case does not deny the equal protection of the laws.

The motion for judgment must therefore be resolved in favor of the respondent, and the petition dismissed at relator's costs.

Judgment for respondent.

Jones, Matthias, Day, Allen, Kinkade and Robinson, JJ., concur.

Reporter's certificate to foregoing paper omitted in printing.

[fol. 39] In Supreme Court of the United States

Statement of Points to be Relied Upon and Designation by Plaintiff in Error of Parts of the Record to be Printed—Filed February 1, 1926

The City of Cincinnati has provided in Chapter 8 "Licenses" of its Ordinances that "No person shall be engaged in any trade, business or profession * * * unless he * * * shall have obtained a license therefor, as hereinafter provided."

As a part of said Chapter an amended Ordinance was enacted in 1918 (during the World War) requiring a license fee to be paid by each proprietor of a billard table, "provided, however, that no license shall be granted to a person who is not a citizen of the United States."

The amendment consists of the last quoted words, to which exception is taken.

The Realtor, a subject of the King of England, challenges the validity of the provision denying him a license for which he applied, for the sole reason that he is not a citizen of the United States.

Point One

The said provision in said Ordinance of the City of Cincinnati is in violation of and contrary to the treaties of commerce between the United States and Great Britain now in full force and effect; that the protection of the provisions of said treaties and especially the "national treat-
[fol. 40] ment" and "most favored nation" clauses thereof are invoked by the relator for himself and for all other aliens similarly situated.

In May, 1924, the U. S. Supreme Court unanimously held to be invalid an Ordinance of the City of Seattle, (effective July, 1921) for Licensing and regulating the business of pawnbroker," which ordinance provided, "that no license shall be issued unless the applicant be a citizen of the United States," thus reversing the Supreme Court of the State of Washington. Asakura vs. City of Seattle, 265 U. S. 332.

The Seattle Ordinance (enacted in 1921) was pat-erned after the Ordinance of Cincinnati which was enacted in 1918.

Seattle (1921)	Cincinnati (1918)
"That no license (as a pawnbroker) shall be issued unless the applicant be a citizen of the United States."	"No license (to operate billiard tables) shall be granted to a person who is not a citizen of the United States."

Point Two

That said Ordinance is void and in contravention of Section One of the Fourteenth Amendment to the Constitution of the United States, in that it denies to him and other aliens the equal protection of the law.

Point Three

That the said Ordinance discriminates against the relator and all aliens in favor of naturalized and native born citizens and denies relator a license simply because he is an alien. That the provisions of the Constitution of Ohio re-

quiring that all laws passed by the General Assembly must be of a general nature and have a uniform operation throughout the state, prohibit the council of a municipality from enacting ordinances not of a general nature and which do not have a uniform operation on all classes of persons in the city of Cincinnati.

Requisition

The Clerk will kindly print the whole record, omitting if possible all captions and verifications and unnecessary parts of pleadings.

George S. Hawke, Attorney for Plaintiff in Error,
Cincinnati, Ohio.

[fol. 41] [File endorsement omitted.]

Endorsed on cover: File No. 31,625. Ohio Supreme Court. Term No. 902. The State of Ohio ex rel. James Clarke, plaintiff in error, vs. Alfred F. Deckebach, as auditor of the city of Cincinnati. Filed January 20th, 1926. File No. 31,625.

FILE
NOV 18
WM. R. STA

No. 272.
OCTOBER TERM, 1926.

Supreme Court of the United States

THE STATE OF OHIO, ex rel. JAMES CLARKE,
Plaintiff in Error,

vs

ALFRED F. DECKEBACH, as Auditor of the City of Cincinnati,
Defendant in Error.

In Error to the Supreme Court of the State of Ohio.

BRIEF OF PLAINTIFF IN ERROR

GEORGE S. HAWKE,
Cincinnati, Ohio,
Attorney for Plaintiff in Error.

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Supreme Court of the United States

October Term, 1926.

THE STATE OF OHIO, EX REL JAMES CLARKE,
Plaintiff in Error,

No. 272 *vs.*

ALFRED F. DECKEBACH, as Auditor of the CITY OF CINCINNATI,
Defendant in Error.

In Error to the Supreme Court of the State of Ohio.

Brief for Plaintiff in Error.

STATEMENT OF THE CASE.

Plaintiff in error residing in Cincinnati, Ohio, *is a subject of the King of England.* During the World War, in the year 1918, the City Council of Cincnnati, passed an ordinance providing for the licensing of billiard tables, and amended the former ordinance on the same subject by adding to the old ordinance the words, *"provided however, that no license shall be granted to a person who is not a citizen of the United*

States."

The chapter entitled "Licenses" of the Code of Ordinances, of which the billiard table ordinance is one section, makes it unlawful for any person to engage in any business therein enumerated including the business of operating billiard tables unless he shall first secure a license therefor. Violations of the ordinance are by said Chapter punishable by fine or imprisonment.

The plaintiff in error made a regular application for a license *and was refused on the sole ground of being an alien,* whereupon this suit in mandamus, an original action in the Supreme Court of Ohio, was brought against the Auditor of the City, the proper authority, to compel him to issue such a license. The ordinance was attacked on the ground that it violated the treaty between the United States and Great Britain, and also denied the equal protection of the laws guaranteed by the Fourteenth Federal Amendment. Plaintiff in error declared his willingness to comply with any valid ordinance relating to the business of operating billiard tables.

The Ohio Supreme Court issued its alternative writ of mandamus, and the respondent filed an answer admitting all the facts alleged in the petition. The relator then filed a Motion for Judgment on the Pleadings, which motion was resolved in favor of the respondent and final judgment was rendered thereon against the relator, and the ordinance was held valid. The case is here on writ of error under Section 237 of the Judicial Code.

Propositions Discussed.

Point 1. The provision of the Billiard Table License Ordinance of the City of Cincinnati "that no license shall be granted to a person who is not a citizen of the United States," is in violation of and contrary to the Treaty between the United States and Great Britain, of which latter country the Plaintiff in Error is a subject.

Point 2. That said Ordinance is void and in contravention of Section One of the Fourteenth Amendment to the Constitution of the United States, in that it denies to the Plaintiff in Error and to all other aliens the equal protection of the law.

Point 3. That said Ordinance discriminates against all aliens in favor of naturalized and native born citizens, and denies plaintiff in error a license simply because he is an alien.

The Ordinance Involved.

An Ordinance, No. 76-1918, "Providing for the Licensing of Billiard and Pool Tables by Amending Original Section 777 of the Code of Ordinances of the City of Cincinnati."

Be it ordained by the Council of the City of Cincinnati, State of Ohio:

Section 1. That original Section 777 of the Code of Ordinances of the City of Cincinnati be and the same is hereby amended to read as follows:

Section 777. Billiard Table, etc.—Each proprietor of a billiard or pool table shall pay a license of twenty-five ($25.00) dollars per annum for one such table and fifteen ($15.00) dollars per annum for each additional

table; *provided however that no license shall be granted to a person who is not a citizen of the United States.*

Section 2. That said original Section 777 of the Code of Ordinances be and the same is hereby repealed.

Section 3. This ordinance shall take effect and be in force from and after the earliest period allowed by law.

Passed February 26, A. D. 1918.

BRIEF OF ARGUMENT.

Point One.

THE PROVISION OF THE BILLIARD TABLE LICENSE ORDINANCE OF THE CITY OF CINCINNATI "THAT NO LICENSE SHALL BE GRANTED TO A PERSON WHO IS NOT A CITIZEN OF THE UNITED STATES," IS IN VIOLATION OF AND CONTRARY TO THE TREATY BETWEEN THE UNITED STATES AND GREAT BRITAIN, OF WHICH LATTER COUNTRY THE PLAINTIFF IN ERROR IS A SUBJECT.

In May, 1924, the U. S. Supreme Court unanimously held to be invalid an Ordinance of the City of Seattle (effective July, 1921), for "Licensing and regulating the business of pawnbroker," which ordinance provided, "that no license shall be issued unless the applicant be a citizen of the United States," thus reversing the Supreme Court of the State of Washington. *Asakura* v. *City of Seattle*, 265 U. S., 332.

The Seattle Ordinance (enacted in 1921) was patterned after the Ordinance of Cincinnati which was enacted in 1918.

Seattle (1921)	Cincinnati (1918)
"That no license (as a pawnbroker) shall be issued unless the applicant be a citizen of the United States."	"No license (to operate billiard tables) shall be granted to a person who is not a citizen of the United States."

(a) The Treaty's Protection Determined.

In the instant case, in considering the provisions of the treaty invoked by the plaintiff, the Supreme Court of Ohio, in its opinion at page 18 of the Transcript said, "*The treaty* (of the United States with Great Britain) *does protect merchants and traders, and if Clarke is a trader he is entitled to protection as such.*"

That finding is correct but the said court fell into error in thereafter holding that the business of Clarke is not a trade protected by and within the meaning of the treaty.

(b) Definition of the Word "Trade."

The city of Cincinnati has itself chosen to define and classify the operation of billiard tables as a "*Business, Trade, or Profession,*" and having done so, it is estopped to deny its existence as a lawful business.

The Billiard Table License Ordinance is Numbered 777, *and it is a part of Chapter 8* of the Code of Ordinances, from which Chapter it cannot be considered apart. Said Ordinance No. 777 is an *Ordinance to License,* and the title reads, "An Ordinance No. 76-1918, Providing for the licensing of billiard and pool tables, by amending original Section 777 of the Code of Ordinances of the city of Cincinnati."

Chapter 8 of the Code of Ordinances is entitled "*Licenses*" and is quite long and levies a license on very many lines of business and the chapter consists of 49 sections numbered 763 to 812 (including of course No. 777). The first section of Chapter 8 (being Section 763) is as follows: "No person shall be engaged in any *Trade, Business or Profession* hereinafter men-

tioned unless he or she shall have obtained a license therefor, as hereinafter provided."

Thus it will be seen, that *by its own definition* in said Section 763 of Chapter 8, *the city has made the operation of billiard rooms a "trade, business or profession."*

In the absence of a definition the Ohio Supreme Court might have felt it incumbent upon itself to define the term "trade," but it is unnecessary in the present case because the definition has been written and settled by the lawmaking body, to-wit, the city council, which has gone on record as considering the conduct of a billiard room as a lawful *"trade, business or profession."*

In holding that the operation of billiard tables was not a trade the Ohio Supreme Court said (page 18, Transcript of Record) "The word 'trade' has a well-settled meaning in commerce, which has been adopted by courts generally as the business of the purchase and sale of goods, wares and merchandise," *but none of the authorities cited by said court are in point* as we show later in this brief.

It is evident that the Ohio Supreme Court has entirely overlooked the fact, that the business of operating billiard tables is classed as a *"trade, business or profession"* by the city of Cincinnati.

We cite the following authorities giving the broader meaning of the term "trade."

In Schooner Nymph, 1 Summ. (U. S.) 517, in interpreting the word trade as used in a statute declaring that if any licensed vessel or ship "shall be employed in any other trade than that for which she is licensed," she shall be forfeited, Storey, J., said:

> "The word 'trade' is often, and indeed generally, used in a broader sense, as equivalent to occupation, employment, or business, whether manual or mercantile. Whenever any occupation, employment or business is carried on for the purpose of profit or gain or a livelihood, not in the liberal art or in the learned professions, it is constantly called a trade."

In that case codfishing was held to be a trade.

In the case of *State* v. *North,* 160 N. C., 1010, the court had under consideration the case of a statute authorizing taxation of trades, professions, franchises and incomes, and during the course of an opinion said trade comprehends,

> "Not only all who are engaged in buying and selling merchandise, but all whose occupation or business it is to manufacture and sell the products of their plants. It includes in this sense any employment, or business embarked in for gain or for profit."

In *State* v. *Phipps,* 50 Kan., 609, the court, speaking of "trade" said:

> "In the broader sense it is any occupation or business carried on for subsistance or profit."

In *Smith* v. *Cooley,* 65 Cal., 46, the court said:

> "The working of a mine under a bare 'mining right' has been uniformly considered by courts of equity as a species of trade."

In the case of *State, ex rel. Denny,* v. *Bridges,* 19 Wash., 44, the court said:

> "As asserted by counsel for plaintiff, the word 'Commercial' is one of wide signification, and in its general sense may mean almost any transaction or intercourse, between men."

In the recent case of *State* v. *Tagami*, 195 Cal., 522, the court held that *a lease of land* to a Japanese alien for the sole purpose of using and occupying the same as a *health resort and sanitarium*, is for such a 'commercial' purpose as comes fairly within the intendment of the existing treaty between the United States and Japan.

It is worthy of note, that the California court in its opinion refers to and follows the recent decision of this court in the case of *Asakura* v. *Seattle*, 265 U. S., 332.

(c) The Asakura Case.

In the *Asakura case* the Washington Supreme Court was found in error in its holding that pawnbroking was a privilege, which might be absolutely denied to any one, and that no one had an inherent right to pursue it, and that under the police power of the state *a Japaneese alien* might be denied a license to operate a pawn shop.

(d) An Unlawful Exercise of the Police Power.

In the instant case, the Ohio Supreme Court has fallen *into the same error* as the Washington Supreme Court did in the *Asakura case*.

In that case the court's reasoning was based upon the proposition that under the *police power* of the state *any regulation* of the business of pawnbroker was valid, even to denying the right of an alien to engage in it, nothing in treaties or the Federal Constitution to the contrary notwithstanding.

And the Washington Supreme Court in that case indicted the pawnbroking business in the following language:

"Pawnbroking has not so often come before the courts for consideration, but we find that decisions conform to what is the general understanding of men in holding that pawnbroking is a business which is surrounded with some degree of menace to the public good. In certain of its aspects, pawnbroking may be harmless, but, on the other hand, it is common knowledge that both on account of the nature of the business itself and somewhat on account of the character of those who engage in it, it offers a ready shelter for thievery, and to that extent encourages criminality. This aspect of the business has been recognized by both our state and city governments for statutes and ordinances will be found which attempt to strictly regulate the manner in which pawnbroking may be conducted, and providing, among other things, for a constant and careful police inspection and control. So that where the question as to the character of pawnbroking has arisen we find the courts deciding that to be allowed to engage therein is a privilege and not an inherent right."

However, in considering this opinion, the U. S. Supreme Court said in reversing the state court, 265 U. S., 332, at page 343:

"We have found no state legislation abolishing or forbidding the business. Most, if not all, of the states provide for licensing pawnbrokers and authorize regulation by municipalities. While regulation has been found necessary in the public interest, the business is not on that account to be excluded from the trade and commerce referred to in the treaty. Many worthy occupations and lines of legitimate business are regulated by state and federal

laws for the protection of the public against fraudulent and dishonest practices. There is nothing in the character of the business of pawnbroker which requires it to be excluded from the field covered by the above quoted provision, and it must be held that such business is 'trade' within the meaning of the treaty. The ordinance violates the treaty."

In the instant case the Ohio Supreme Court said. (Page 19 Record):

"This record raises no issue concerning the personal character of the relator. We are not called upon to determine whether the relator has personal qualities which deny him the right to operate a pool table in the city of Cincinnati, but, on the contrary, we are only called upon to determine whether the class in which he belongs may properly be excluded from such occupation. The answer contains allegations about the character of pool rooms and of the lack of knowledge on the part of aliens concerning our laws and institutions. It is not our purpose to consider these allegations as reflecting upon the character of this relator, but we cannot ignore those allegations in determining the validity of the municipal legislation. Whether or not those allegations correctly state the character of pool rooms and the state of mind of subjects of foreign countries, the motion for judgment upon the pleadings assumes the truth of all those allegations. This legislation is enacted in the exercise of the police power, and its validity is therefore a political question, except that this court may consider as a justiciable question whether it is a reasonable exercise of such power. Under the well-settled rules which have heretofore been declared by this

> court, we may not declare that legislation invalid unless it has no reasonable relation to the public morals, public health, public order, and the peace and tranquility of the municipality. In view of the allegations of the answer, admitted as they are by the motion for judgment upon the pleadings, we are unable to find the legislation unreasonable."

(e) Not One of the Authorities Cited by the Ohio Supreme Court is in Point.

We understand that a "precedent" is an adjudged case considered as furnishing a rule for the determination of an identical or similar case afterwards arising, or of a similar question of law.

The only theory on which it is possible for one decision to be an authority for another is that the facts are alike, or, if the facts are different, that the principle which governed the first case is applicable to the variant facts. The question is, what is the underlying principle which caused a case to be decided as it was decided.

This being so, we now respectfully show in the order of their citation, *that none of the cases* referred to by the Ohio Supreme Court *are authorities in the instant case.*

> In re Hudson River Electric Power Co., (D. C.), 173 Fed., 934, 947. (Cited in opinion at page 18 of Printed Record.)

This was a bankruptcy case, involving the following subjects: Corporations subject to Act; Nature of Corporate Business; Act of Bankruptcy; Receivership; Public Service Corporation; Petitioning Creditors; Involuntary Proceedings; Right of Receiver to Contest.

The Ohio Supreme Court refers to page 947 of this Bankruptcy case for a definition of the word "trade," but no definition is there or anywhere in the case applicable in any way to the case at bar. In this bankruptcy case at page 947 the court says, "The question presented is: Was this company engaged principally in trading or mercantile pursuits within the meaning of the bankruptcy law?"

Clearly this citation is not in point.

Jackson v. *Town of Union*, 82 Conn., 266. (Page 18 Record).

The plaintiffs were engaged in *purchasing standing timber* and sawing lumber therefrom and objected to paying a tax levied on their businesss.

The court said at page 269, "The words of the statute, any trading * * * or mercantile business," are sufficiently comprehensive to include such a business as that described in the complaint. To "trade" is to engage in the purchase or sale of goods, wares and merchandise."

We say that this language of the court was not all embracing and did not intend to be. It was used only for the construction of the specific taxation statute upon the facts then before it.

The language of the court in any case must be considered with reference to the subject matter before the court.

Therefore we say that this taxation case is not in point for a definition in the instant case.

May v. *Sloan*, 101 U. S., 231. (Page 18 Record).

This was a bill in equity filed in the Circuit Court

for the 2nd Judicial Circuit of Florida, *to compel a conveyance of a tract of land in Florida.*

The court said at page 237, "The question must stand then, on the construction to be given to the written agreement of January 5, 1874, in view of the surrounding circumstances and the acts of the parties. Does the last clause of that agreement by its terms embrace the transaction contained in the contract made by Alvin May and Sloan on the 13th of December 1873? Was that transaction a 'trade' made by Alvin May relating to the mortgaged property, within the meaning of the terms? Was it a 'trade' carried out in good faith and completed?"

On page 239 the court held, "In the light of all these circumstances, it is hard to resist the conclusion that the word 'trade' in the agreement of January 5, 1874, was used by the parties in its broadcast signification, so as to include any bargain or sale. As such a meaning of the term is admissible, we think that the circumstances and acts of the parties show that it must have been intended. This being conceded, it plainly became the duty of Asa May after having purchased the property, to convey the land in question to the appellee."

So we maintain that this real estate case definition of the word "trade" can have no bearing upon the instant case.

Schmidinger v. *Chicago*, 226 U. S., 578. (Page 19 Record).

This case involves an ordinance *regulating the sale of bread* in the loaf within the city of Chicago.

The plaintiff claimed that the due process clause of the 14th Amendment was violated, in that the ordi-

nance was an unreasonable and arbitrary exercise of the police power.

The Ohio Supreme Court in citing this case says, "That case is not strictly in point in deciding the instant case, because the city of Cincinnati in its regulation of the business of operating a pool room has withheld rights from aliens which are granted to citizens."

We do not know why this case should have been cited at all, when the court itself says it is not strictly in point.

Bloomfield v. *State*, 86 O. S., 253. (Page 19 Record).

This is a case holding that a *license to traffic in intoxicating liquor* might be withheld from aliens though it would be granted to citizens.

We answer this citation in the words of the court in *Trageser* v. *Gray*, 73 Md., 250, in which case the question presented was whether aliens could be excluded from selling liquor. "This (the liquor business) is a business peculiar to itself, which might be wholly prohibited by the legislature."

We also answer in the words of the court in *Templar* v. *Board*, 131 Mich., 258, "So, too, a different question is presented that was before the court in *Trageser* v. *Gray*, 73 Md., 250, a case much relied upon by the Attorney General. In that case the question presented was whether aliens could be excluded from engaging in the business of retailing liquors. This is a business peculiar to itself, which might be wholly prohibited by the legislature, and licenses might be confined to a limited number. We need not, therefore, inquire whether such legislation is an infraction of the rights of the individual not a citizen."

We claim that this old liquor case cited by the Ohio Supreme Court is also not in point.

Heim v. *McCall*, 239 U. S., 175. (Page 20 Record).

This case decides that the *labor law of New York*, prohibiting the employment of aliens on public works, and its threatened enforcement, do not violate the 14th Amendment or the rights thereunder, nor under the provisions of the treaty with Italy.

The court quotes with approval at page 192, "It belongs to the state as the guardian of its people and having control of its affairs, to prescribe the conditions upon which it will permit public work to be done on its behalf, or on behalf of its municipalities."

We say that there is nothing pertaining to the construction of public works in the operation of a privately owned billiard room in Cincinnati, which would make this last and final case cited by the Ohio Supreme Court any authority in the instant case.

We respectfully submit, that not one of the cases cited by the Ohio Supreme Court is in point.

Point 2.

That Said License Ordinance is Void and in Contravention of Section One of the Fourteenth Amendment to the Constitution of the United States, in That it Denies to the Plaintiff in Error and all Other Aliens the Equal Protection of the Law.

In the *Asakura case* before referred to, this court did not pass upon the contention of Asakura that the Seattle Ordinance was repugnant to the Fourteenth Amendment, but simply stated at the close of the opinion. "We need not consider other grounds upon which the ordinance is attacked."

In the instant case the Ohio Supreme Court said (Page 16 of Record) "This ordinance was challenged in a former proceeding in this court, entitled *State ex rel. Balli* v. *Carrell, Auditor,* 99 Ohio St., 285, in which this court held that it was not in conflict with any provision of the state or federal Constitution."

We desire to call attention to the fact, that unfortunately in the *Balli case,* error was never prosecuted to this court and therefore this court never had the matter for consideration. We strongly contend that the decision of the Ohio Supreme Court in the *Balli case* was erroneous, and we are glad that this court now has the opportunity to finally determine the matter.

(f) Protection Not Confined to Citizens Only.

Upon the allegations of the petition in the instant case, it must be assumed that the plaintiff in error has been admitted to the United States under Federal Law, with the privilege of abiding in the United States and hence of residing in any State of the Union. Being lawfully an inhabitant of Ohio, and a resident of Cincinnati, the petitioner is entitled under the 14th Amendment to the equal protection of its laws.

In the well known case of *Yick Wo* v. *Hopkins,* 118 U. S., 356, 359, this Court said:

> "The Fourteenth Amendment to the Constitution is not confined to the protection of citizens."

In the case of *Truax* v. *Raich*, 239 U. S., 33, 39, this Court said:

> "Being lawfully an inhabitant of Arizona, the complainant is entitled under the 14th Amendment to the equal protection of its laws. The description 'any person within its jurisdiction' as it has frequently been held, includes aliens." "These provisions," said the court in *Yick Wo* v. *Hopkins*, 118 U. S., 356, 369, (referring to the due process and equal protection clauses of the Amendment) "are universal in their application to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge to the protection of equal laws."

(g) Discrimination Against Aliens Prohibited.

In *State* v. *Montgomery*, 94 Maine, 192, the court held unconstitutional an act requiring all peddlers to secure a license, *and denying a license to an alien*, and in so doing said:

> "Nor can this discrimination be sustained as a constitutional exercise of the police power of the state. It must be noted that the discrimination is not against a class, as criminals, as paupers, as intemperates and disqualified by character or habits, or as harmful to society, but as against a class solely as aliens. Such a discrimination is forbidden."

In *Templar* v. *Board*, 131 Mich., 254, 258, the court held unconstitutional an act which under the police power required barbers to take out a license, after passing an examination, *but which denied a license to aliens*, the plaintiff being a Canadian. In its opinion the court said:

"But had it (the Board) the right to require citizenship? If it had the right to couple that with *other* requirements, it would have the right to make that the *only* requirement."

* * * *

In the case of *American Sugar Refining Co.* v. *Louisiana*, 179 U. S., 89, 92, this Court said:

"The act in question does undoubtedly discriminate in favor of a certain class of refiners, but this discrimination, if founded upon a reasonable distinction in principle is valid. Of course, if such discrimination were purely arbitrary, oppressive, or capricious, and made to depend upon differences of color, *RACE, NATIVITY*, religious opinions, political affiliations, or other considerations having no possible connection with the duties of citizens as tax payers, such exemption would be pure favoritism and a denial of the equal protection of the laws to the less favored classes."

In the case of *Commonwealth* v. *Titcomb*, 229 Mass., 14, the court said:

"It (the legislature) cannot proscribe one class upon the basis of race."

In the case of *In re Parrott*, 1 Fed. Rep., 481, the court held that discriminating legislation by a state against any class of persons, or against any persons of a particular race or nation, *in whatever form it may be expressed*, deprives such class of persons, or persons of such particular race or nation, of the equal protection of the laws, and is prohibited by the 14th Amendment.

In the case of *Buchanan* v. *Warley*, 245 U. S., 60, this court held that a city ordinance forbidding colored

persons from occupying houses on blocks where a majority of the houses are occupied by whites, and which bases the interdiction upon color and nothing more, passes the legitimate bounds of police power and invades the civil right to acquire, enjoy, and use property, which is guaranteed in equal measure to all citizens, white or colored, by the Fourteenth Amendment.

We maintain that the Ordinance involved in this case cannot be justified as an exercise of the police power. Like any other law, police regulations are subject to the equal protection of the 14th Amendment.

In *Atchison, Topeka & Santa Fe Ry.* v. *Vosburg,* 238 U. S., 56, 59, this court said:

> "But we cannot at all agree that a police regulation is not, like any other law, subject to the 'equal protection' clause of the 14th Amendment. The constitutional guaranty entitles all persons and corporations within the jurisdiction of the state to the protection of equal laws, in this as in other departments of legislation. It does not prevent classification, but does require that classification shall be reasonable, not arbitrary, and that it shall rest upon distinctions having a fair and substantial relation to the object sought to be accomplished by the legislation."

In *Allgeyer* v. *La.,* 165 U. S., 578, 589, this court said:

> "The liberty mentioned in the fourteenth amendment means not only the right of the citizen to be free from the mere physical restraint of his person, but * * * the right to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livlihood or vocation."

Point 3.

The Ordinance Discriminates Against all Aliens in Favor of Naturalized and Native-Born Citizens, And Denies Plaintiff in Error a License Simply Because he is an Alien.

(h) A Lawful Amusement.

In *Murphy* v. *Cal.*, 225 U. S., 623, 629, this court said:

> "*Playing at billiards is a lawful amusement,* and keeping a billiard hall is not, as held by the Supreme Court of California on plaintiff's application for habeas corpus, a nuisance *per se.*"

Ex parte Meyers, 7 Cal. App., 528, 530.

(i) A Lawful Business.

The business of operating billiard tables for hire is now and *always has been a lawful one under the laws of Ohio* and the ordinances of Cincinnati, and the city council cannot prohibit any honest man from engaging in it.

On the other hand, if the business is unlawful, the city cannot license it and the issuance of a license does not make a wrong business right.

It is a lawful business, which may be considered essential by its patrons and non-essential by other persons.

(j) Not a Nuisance Per Se.

A billiard room is not a nuisance *per se;* it is not necessarily harmful to the public welfare.

In *Ex parte Murphy*, 8 Cal. App., 440, 444 the court said:

> "We may concede at the outset that the business of conducting a public billiard room *is not per se a nuisance.*"

In *ex parte Meyers*, 7 Cal. App., 528, 530, the court said:

> "Freed from these influences (namely the professional billiard gambler) there can be no greater objection to them than to any other place of amusement. Indeed, it is quite probable that they often supply a resort and occupation for those who otherwise would visit places about whose immorality no question exists."

In *State* v. *McMonies*, 75 Neb., 443, 445, the court said:

> "The plaintiff's pool hall not being a nuisance *per se*, and the village authorities having no right to suppress it, as such, until by its management and conduct it becomes a nuisance in fact, what are the powers of the village board in dealing with it and other like places?"

(k) Must Be a Nuisance In Fact.

If a thing is not in fact a nuisance *per se*, it cannot be made so by a mere declaration of the legislative will expressed in an ordinance.

Hume v. *Cemetery*, 142 Fed. Rep. 552, 565.
Yates v. *Milwaukee*, 10 Wall. 497, 505.

In *State* v. *Hall*, 32 N. J. L. 158, 159, the court said:

> "In a legal point of view, a house may be disorderly in two ways, viz.: First, from the end or purpose to which it is appropriated; and Second, from the mode in which it is kept."
>
> "The end or purpose for which the house is designed, will render the keeping of such house illegal, if it be such as, of necessity, contravenes the provisions of any public statute; or be such as must be injurious to the public morals, peace or health; or to the comfort of

society. Instances of this sort are brothels, or places kept as a rendezvous for thieves. But if the purpose of the house be not necessarily injurious to society, the keeping of such house is never criminal, unless it be made so by the manner in which it is conducted."

In *Adams* v. *Tanner*, 244 U. S., 590, 594, this court said:

> "Because abuses may, and probably do, grow up in connection with this business (employment agency) is adequate reason for hedging it about by proper regulations. But this is not enough to justify destruction of one's right to follow a distinctly useful calling in an upright way. Certainly there is no profession, possibly no business, which does not offer peculiar opportunities for reprehensible practices, and as to every one of them, no doubht some can be found quite earnestly to maintain that its suppression would be in the public interest. Skillfully directed agitation might also bring about apparent condemnation of any one of them by the public. Happily for all, the fundamental guaranties of the constitution cannot be freely submerged if and whenever some ostensible justification is advanced and the police power invoked."

(1) Police Power Is Subject To Constitutional Limitations.

The Police Power may be exercised to protect the public health, morals, safety and the general welfare, but it is at all times subject to the constitutional limitations that it may not arbitrarily take away the lawful rights of a citizen.

Lawton v. *Steele*, 152 U. S., 133, 137;
Connolly v. *Union Sewer Pipe Co.*, 184 U. S., 540, 558;
Dobbins v. *Los Angeles*, 195 U. S., 223, 228;
Yick Wo v. *Hopkins*, 118 U. S., 356;
C. B. & Q. R. R. v. *Ill.*, 200 U. S., 561, 592, 593.

(m) Its Exercise Is a Judicial Question.

Whether a particular regulation is a valid exercise of the police power is ultimately a judicial, not a legislative question.

Mugler v. *Kas.*, 123 U. S., 622, 661;
Gulf Colo. & S. F. Ry. v. *Ellis*, 165 U. S., 150, 154;
Lockner v. *N. Y.*, 198 U. S., 45, 60.

(n) The Ordinance Is Unreasonable.

The Ordinance we challenge is not one to regulate billiard tables. *Other* ordinances of Cincinnati regulate such tables, namely those which make it unlawful for *any* billiard room to remain open after midnight and which make it unlawful for *any* person to play after said hour.

The matter before this court is only the *Ordinance to License* which denies a license to each and every *alien* simply because he is an alien, and without any regard to his *fitness or character*.

The City is not at liberty to treat the ownership of a billiard room by an alien as in itself a peril requiring restraint, regardless of the good character of the alien who owns it, and the manner in which it is conducted.

The Ordinance stamps as incompetent and unworthy every alien who wishes *as a proprietor* to operate billiard tables. Nothing however is done about the many

cases in which the billiard rooms *are managed and conducted by aliens as agents,* for citizen owners who have licenses. We ask, how can this business be dangerous to society when *owned* by an alien when it is not objectionable when *managed* by an alien?

We maintain that an alien has no more ability to properly conduct a billiard room the day after he is granted his full citizenship papers than he had the day before his hearing in the Federal Court. Nevertheless, under this unreasonable Ordinance, in one case he can get a license and in the other he can not. *It is the same man in each instance,* and the grant of Citizenship cannot render him more competent.

If prohibiting aliens from engaging in the business would remove all objections to it, there might be a reasonable ground for the classification, but as matters now stand, *there is no such reasonable ground.*

(o) The Classification Sought to be Drawn Is Purely Arbitrary and Rests Upon No Reasonable Basis.

The Ordinance confers privileges upon some persons which it denies to others. It is not a legitimate exertion of the power of classification. It rests upon no reasonable basis and is purely arbitrary, and plainly denies the equal protection of the laws to those against whom it discriminates. It is not based on natural grounds of reasonableness or public policy and does not tend to promote the public welfare.

In *Truax* v. *Corrigan,* 257 U. S., 312, 337, this court speaking through Mr. Chief Justice Taft said:

> "Classification is the most inveterate of our reasoning processes. We can scarcely think or speak without consciously or unconscciously

> exercising it. It must therefor obtain in and determine legislation; *but it must regard real resemblances and real differences* between things and persons, and class them in accordance with their pertinence to the purpose in hand."

In *Gulf, Colo. & Santa Fe Ry.* v. *Ellis*, 165 U. S., 150, 165, this court said:

> "It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the 14th amendment, and that in all cases it must appear not only that a classification has been made, *but also that it is one based upon some reasonable ground*, some difference which bears a just and proper relation to the attempted classification, *and is not a mere arbitrary selection.*"

In *Barbier* v. *Connolly*, 113 U. S., 27, 32, this court said:

> "Class legislation discriminating against some and favoring others, is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment."

In *Soon Hing* v. *Crowley*, 113 U. S., 703, 709, this court said:

> "The discriminations which are open to objection are those where persons engaged in the same business are subjected to different restrictions or are held entitled to different privileges under the same conditions."

In the Civil Rights Cases, 109 U. S., 3, this court said:

> "The Fourteenth Amendment exends its protection to races and classes, and prohibits any state legislation which has the effect of denying to any race or class, or to any individual, the equal protection of the laws."

In *Pembina Mining Co.* v. *Pa.*, 125 U. S., 181, 188, this court said:

> "The inhibition of the Fourteenth Amendment that no state shall deprive any person within its jurisdiction of the equal protection of the laws, was designed to prevent any person, or class or persons, from being singled out as a special subject for discriminating and hostile legislation."

In *Dent* v. *W. Va.*, 129 U. S., 114, 121, this court said:

> "It is undoubtedly the right of every citizen of the United States to follow any lawful calling, business or profession he may choose, subject only to such restrictions as are imposed upon all persons of like age, sex and condition."

In *Duncan* v. *Mo.*, 152 U. S., 377, 382, this court said:

> "The due process and equal protection of the laws are secured if the laws operate on all alike, and do not subject the individual to an arbitrary exercise of the power of government."

Cotting v. *Godard*, 183 U. S., 79, 112;
In re Yot Sang, 75 Fed. Rep. 983;
Yick Wo v. *Hopkins*, 118 U. S., 356;
Nashville Ry. v. *Taylor*, 86 Fed. Rep. 168;
In re Parrott, 1 Fed. Rep. 481;
Fraser v. *McConway*, 82 Fed. Rep. 257.

(p) The Ordinance Has No Real or Substantial Relation to the Protection of the Public Morals or the Public Welfare.

To hold otherwise would be to brand every alien as bad, incompetent and undesirable, and to approve every naturalized or native born citizen as good, competent and law abiding, who for the mere fact of citizenship is entitled to a license. Under the Ordinance no alien, *no matter how honest and law abiding,* can obtain a license, while any bad, undesirable native-born or naturalized applicant can obtain the favor.

In *Booth* v. *Ill.*, 194 U. S., 425, 429, this court said:

> "The courts cannot interfere, unless looking through mere forms and at the substance of the matter, they can say that the statute enacted professedly to protect the public morals has no real or substantial relation to that object, but is a clear, unmistakable infringement of rights secured by the fundamental law."

In *Connolly* v. *Union,* 184 U. S., 540, 558, this court said:

> "The State has undoubtedly the power by appropriate legislation to protect the public morals, the public health and the public safety, but if, by their necessary operation, its regulations looking to either of those ends amount to a denial to persons within its jurisdiction of the equal protection of the laws, they must be deemed unconstitutional and void."

In *Mugler* v. *Kas.*, 123 U. S., 623, 661, this court said:

> "It does not at all follow that every statute enacted ostensibly for the promotion of these ends (namely, the protection of the public

morals, the public health or the public safety) is to be accepted as a legitimate exertion of the police powers of the state. There are, of necessity, limits beyond which legislation cannot rightfully go. The courts are not bound by mere forms, nor are they to be misled by mere pretences. They are at liberty, indeed, are under a solemn duty, to look at the substance of things, whenever they enter upon the inquiry whether the Legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those subjects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge and thereby give effect to the Constitution."

In *Minn.* v. *Barber,* 136 U. S., 313, 320, this court said:

"Upon the authority of these cases and others that could be cited, it is our duty to inquire in respect to the statute before us, not only whether there is a real or substantial relation between its avowed objects and the means devised for attaining those objects, but whether by its necessary or natural operation it impairs or destroys rights secured by the Constitution of the United States."

(q) Valid Ordinances Sometimes Totally Prohibit, But Always Apply To All Persons Alike.

Ordinances totally prohibiting the keeping of billiard tables have been sustained by the Courts in a number of instances, *but in each case* we have found that the ordinance applied *to all persons alike,* male or female, white or black, *citizen or alien.*

City of Tarkio v. *Cook*, 120 Mo., 1;
City of Clearwater v. *Bowman*, 72 Kas.,92;
City of Corinth v. *Crittenden*, 94 Miss., 41;
Cole v. *Village of Culbertson*, 86 Neb., 160;
Murphy v. *Calif.*, 225 U. S., 623.

In the instant case it must be noted that the City has sought large license fees from the business, and *has not sought to prohibit* the trade, business or calling of providing amusement by the operation of billiard tables.

If some ordinance of Cincinnati had prohibited all billiard tables in the city, making no exceptions to favor some group, such an ordinance could not be classed as discriminatory or class legislation. But this License Ordinance before us is discriminatory and is class legislation of the most flagrant type, and bears no real or substantial relation to the protection of the public morals or the public welfare. It is a clear, unmistakable infringement of rights guaranteed by the fundamental law.

Respectfully submitted,
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